Supreme Court, U.S.
FILED
JUL 23 1997
CLERK

No. 96-1959

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MARGARET MAYER, individually and as Executrix of the ESTATE OF JAMES E. MAYER, Deceased, *Petitioner*,

v.

CORNELL UNIVERSITY AND LAURA BROWN, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY MEMORANDUM

RAYMOND M. SCHLATHER,
Counsel of Record
LoPINTO, SCHLATHER,
SOLOMON & SALK
200 East Buffalo Street
P.O. Box 353
Ithaca, New York 14850
(607) 273-2202

6 pp

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MARGARET MAYER, individually and as Executrix of the ESTATE OF JAMES E. MAYER, Deceased, *Petitioner*,

v.

CORNELL UNIVERSITY AND LAURA BROWN, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Respondents' brief in opposition is characterized more by an eagerness to disparage petitioner than by a reasoned response to petitioner's legal arguments. Petitioner feels compelled not only to respond to the new arguments raised by respondents, and to draw the Court's attention to a relevant case decided since petitioner's initial filing, but also to correct several assertions contained in the opposition brief.

I

The finding below that respondents owed no duty to petitioner or her decedent under New York law does not render the case moot. First, should this Court find that DOHSA does not apply, then under the Erie doctrine a federal court sitting in New York would apply New York's choice of law provisions. In tort cases, New York uses an "interest analysis" approach to determine which jurisdiction has "the greatest concern with the specific issue raised in the litigation." Babcock v. Jackson, 12 N.Y.2d 473 (1963); see also Schultz v. Boy Scouts of America, 65 N.Y.2d 189 (1985). For wrongful death and related survival claims, New York precedent overwhelmingly favors application of the substantive law of the decedent's domicile, in this case, Pennsylvania. See Miller v. Miller, 22 N.Y.2d 12 (1968).

Pennsylvania law differs significantly from New York law on the question of duty. In Pennsylvania, foreseeability plays a larger part in determining the existence of duty than it does in New York. See, e.g., Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3rd Cir. 1993). Thus, the court in Miller v. Group Voyagers, Inc., 912 F.Supp. 164 (E.D.Pa. 1996) noted that while the existence of duty depends on a

"relationship" between the parties, "foreseeability is the basis on which a duty is established." Id. at 167. A court applying Pennsylvania tort law might well find the existence of a duty. The case, therefore, is not moot.

II

Petitioner wishes to draw to the Court's attention a case decided subsequent to petitioner's initial filing that reinforces her position that where a state claim is brought in diversity, which gives an independent basis for federal court jurisdiction, there is a Seventh Amendment right to a jury trial. In Ghotra v. Bandila Shipping Co., 113 F.3d 1050 (9th Cir. 1997), decided on May 13, 1997, the Court of Appeals for the Ninth Circuit concluded that an action brought under state law and based in diversity preserves the plaintiff's Seventh Amendment right to a jury trial for claims that could have been brought at common law, even against claims of federal maritime jurisdiction.

III

With respect to respondents' argument that the petition ought to be denied under Rule 10 of the rules of this Court, the court of appeals' statement of the law regarding the two-prong Executive Jet test was in fact wrong. This Court ruled in

Grubart, Inc. v. Great L.D.& D. Co., 513 U.S.527 (1995) that the proper inquiry under the second prong, relation to traditional maritime activity, is whether the defendant's activity, not that of non-defendants, is maritime in nature.

IV

Finally, respondents' insistence that insufficient conflict exists among the circuits to justify this Court's review of whether a state law-based survival claim may supplement an action under DOHSA serves to prove petitioner's point. Respondents contend that the First and Fifth Circuits support the Second Circuit's position that the federal maritime survival action precludes a state survival action. In fact, the Fifth Circuit, like the Ninth, has ruled that a DOHSA plaintiff may also recover damages under a state survival statute.

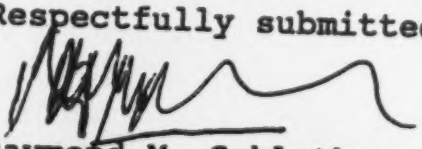
In Snyder v Whittaker Corp., 839 F.2d 1085 (1988), decedent's representatives brought claims under both DOHSA and the Texas survival statute. The court of appeals ruled that "[a]lthough DOHSA does not provide damages for a decedent's pain and suffering, a DOHSA plaintiff may recover such damages under a state survival statute." Id. at 1092. The Fifth Circuit's true position renders the existing conflict between the circuits

more than sufficient to warrant this Court's review.

Moreover, the analysis here of issues of mootness and right to a jury trial demonstrate once again one of the most compelling reasons this Court should review this case -- confusion reigns below. The same putative DOHSA plaintiff could receive substantially differing results depending upon which circuit governs his DOHSA and state survival claims. Such uncertainty and disharmony warrant this Court's review.

Because respondent has made no dispositive or substantial arguments in opposition, and for the reasons set forth in the petition, petitioner respectfully submits that the petition for a writ of certiorari ought to be granted.

Respectfully submitted,



Raymond M. Schlather,
Counsel for Petitioner
LoPINTO, SCHLATHER,
SOLOMON & SALK
200 East Buffalo Street
Ithaca, New York 14850
(607) 273-2202

July 21, 1997